No. 90-1616

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF OHIO,

Petitioner,

v.

LARRY WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

JILL E. STONE
Assistant State Public Defender

Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587
614/466-5394

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THIS COURT REVIEW A CASE IN WHICH THE SUPREME COURT OF OHIO HAD ADEQUATE AND INDEPENDENT STATE GROUNDS ON WHICH TO BASE ITS DECISION?

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JURISDICTION

The judgment of the Ohio Supreme Court was based upon adequate and independent state law grounds, and not upon any provisions of the United States Constitution or other federal law. Therefore, 28 U.S.C. Section 1257(a) does not confer jurisdiction in this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions listed in petitioner's petition for certiorari, this case also involves the following:

Former Ohio Revised Code Section 2933.24(A). Contents of search warrant; report of inspection findings.

> (A) A warrant for search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly described the things to be searched for, the house or place to be searched, and the person to be searched and seized. Such warrant shall command the officer to search such house or place or person named or described for the property or other things, and to bring them, together with the person to be seized, before the judge or magistrate. The command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night in which case a search in the night may be ordered. Such search warrant shall be returned by the officer holding the same not later than three days after the issuance. It shall designate the judge or magistrate to whom it shall be returned, if such judge is available.

Ohio Revised Code Section 2933.25. Form of search warrant.

> Warrants issued under section 2933.21 of the Revised Code shall be substantially in the following form:
> State of Ohio,.....County,ss:
> To the sheriff (or other officer) of said County, greeting:
>
> Whereas there has been filed with me an affidavit of which the following is a copy (here copy the affidavit).
>
> These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the daytime (or in the nighttime) into (here describe the house or place as in the affidavit) of said ..... of the township of ..... in the County aforesaid, and there diligently search for the said goods and chattels, or articles, to wit: (here describe the articles as in the affidavit) and that you bring the same or any part thereof, found on such search, and also the body of E. F., forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.
>
> Given under my hand, this ..... day of .....
>
> A.B., Judge, County Court

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case, with the following additions: Petitioner correctly states that, in the state courts of Ohio, respondent raised his claims pursuant to the Fourth Amendment. However, respondent also invoked the protections of the Ohio Constitution, as well as Ohio statutes and procedural rules.

STATEMENT OF THE FACTS

Respondent accepts the facts as presented by petitioner in its certiorari petition, with the following additions: The anonymous woman who called the Fostoria Police Department did not personally observe any marijuana or other evidence of criminal conduct. Her statements to Police Dispatcher Tim Hatfield were based upon her son's alleged observations. She had no personal knowledge regarding the "information" she was giving to the police.

The police failed to corroborate the anonymous caller's information. The police did nothing, other than discover respondent's prior offenses, to verify the anonymous caller's information.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE OPINION OF THE SUPREME COURT OF OHIO IS BASED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS AND SHOULD NOT BE REVIEWED BY THIS COURT.

The Supreme Court of Ohio held that a search warrant is void **ab initio** if not signed by a judge prior to the search. **State v. Williams**, 57 Ohio St. 3d 24 (1991). The Supreme Court's decision is based upon Ohio law.

The court begins its analysis with a discussion of **State v. Spaw**, 18 Ohio App. 3d 77 (1984). **State v. Williams**, 57 Ohio St. 3d at 24. In **Spaw**, the Ohio Court of Appeals held:

> ... what otherwise purports to be a search warrant is not a search warrant when it lacks

> any signature at all, and the officers here could not reasonably presume its validity. It never acquired the status of being merely voidable but did not exist as a warrant and was void **ab initio**.

State v. Spaw, 18 Ohio App. 3d at 79.

In deciding the **Williams** case, the Ohio Supreme Court adopts the view expressed in **Spaw** and then discusses Ohio's pertinent statutory provisions and procedural requirements. **State v. Williams**, 57 Ohio St. 3d at 25. The court's interpretation of those statutes and the procedural rule form part of the basis of its decision:

> We reach our decision for several reasons. Search warrants are issued pursuant to the authority found in R.C. 2933.21 and Crim. R. 41. R.C. 2933.25 dictates the form of a search warrant. (Footnote omitted). Included in the example form is the issuing judge's signature. Further, R.C. 2933.24(A) provides that "... [s]uch warrant **shall command** the officer to search such house or place or person named or described for the property or other things ..." (Emphasis added.) A command without a known commander cannot be a command.

State v. Williams, 57 Ohio St. 3d at 25.

The court then examines the decisions of two cases from other states, **State v. Surowiecki**, 184 Conn. 95 (1981) and **People v. Hentkowski**, 154 Mich. App. 171 (1986). The court cites these cases with approval. In each case, the respective court found that a magistrate's signature was required on a search warrant. **State v. Williams**, 57 Ohio St. 3d at 25-26.

The Supreme Court of Ohio continues its analysis by mentioning two other areas of Ohio law in which a signature is required. **Id.** The court notes that Ohio law requires a signature for a transfer of real property and for a will. **Id.**

The majority opinion in **Williams** makes absolutely no mention of federal case law, federal statutory provisions, or federal procedural rules. There are no citations to any opinions of this Court. In three places, the majority opinion briefly mentions the Fourth Amendment, but it is always in connection with the Fourth Amendment's virtually identical counterpart of the Ohio Constitution, i.e., Section 14, Article I. The court always cites the Fourth Amendment either in the same sentence with the Ohio constitutional provision or in the sentence immediately preceding the citation to the Ohio provision. The Ohio Supreme Court does not engage in any type of analysis of the Fourth Amendment or the federal case law which the amendment has generated.

The decision of the Ohio Supreme Court in **State v. Williams** was based on "adequate and independent state grounds" and should not be reviewed by this Court. **Michigan v. Long**, 469 U.S. 1032, 1043 (1983). The principle that this Court does not review state court judgments that rest on adequate and independent state grounds is based, in part, on this Court's limited jurisdiction. **Id.** at 1041-1042, citing **Herb v. Pitcairn**, 324 U.S. 117, 125 (1945). This Court does not render "advisory opinions." **Id.** If this Court were to render a decision on Fourth Amendment grounds, the Ohio Supreme Court's decision would remain unaffected. Since it is based on state law, the Ohio Supreme Court's judgment would remain the same, regardless of this Court's position on the federal law. **Id.**

The Ohio Supreme Court is the final authority on questions of Ohio law and the Ohio Constitution. In Ohio, "the syllabus of a decision of the Supreme Court of Ohio states the law of Ohio." **Williamson Co. v. Radich**, 128 Ohio St. 124, 126 (1934). "Only that which is stated in a syllabus or in a **per curiam** opinion represents a pronouncement of the law of Ohio." **Masheter v. Kebe**, 49 Ohio St. 2d 148, 150 (1976). This Court should look at the syllabus for a "plain statement" demonstrating that adequate and independent state grounds were the basis for decision.

The syllabus issued by the Court in **State v. Williams** reads as follows:

> A search warrant is void **ab initio** if not signed by the judge prior to the search.

Id. at 24.

It is immediately apparent that the syllabus in **Williams** is not based on the federal constitution, federal statutes, or federal case law. The court's opinion clarifies the syllabus and clearly demonstrates that it is based on Ohio law. The state law grounds are both independent of any federal grounds and adequate to support the judgment of the Ohio Supreme Court. **Fox Film Corp. v. Muller**, 296 U.S. 207, 210 (1935).

It is equally clear that the Ohio Supreme Court's decision was not the result of its feeling "compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." **Zacchini v. Scripps-Howard Broadcasting Company**, 433 U.S. 562, 568 (1977). The lack of any citations to federal statutes or case law, the lack of any federal analysis and only bare citations to the

Fourth Amendment (in conjunction with citations to the Ohio Constitution) indicate that the Ohio Supreme Court was not compelled to rule as it did by its understanding of federal law. The court's decision was the result of its analysis of Ohio law. The state law ground was not "interwoven" with federal grounds. **See Enterprise Irrigation District v. Farmers Mutual Canal Co.** 243 U.S. 157, 164 (1917).

In the case at bar, the judgment of the Ohio Supreme Court is based upon Ohio law grounds, independent of any federal law considerations. Those state law grounds are adequate to support the Supreme Court's judgment. Therefore, this Court should not review that judgment.

II. ABSENT ANY APPLICABLE EXCEPTION TO THE WARRANT REQUIREMENT, A SEARCH AND SEIZURE MADE INSIDE A HOME, PURSUANT TO A "WARRANT" NOT SIGNED BY A NEUTRAL AND DETACHED MAGISTRATE IS A WARRANTLESS SEARCH AND SEIZURE.

While Mr. Williams asserts that the Ohio Supreme Court's decision in **State v. Williams, supra** is based on adequate and independent state grounds, the decision is also compelled by the dictates of the Fourth Amendment. A search of a home without a warrant is presumptively unreasonable and the evidence seized pursuant to such a search must be suppressed. **Payton v. New York**, 445 U.S. 573 (1980).

The State of Ohio is attempting to create a valid search warrant where none existed. The only markings on the form marked "search warrant" were those made by the police officers (see Supplemental Appendix to state's petition for writ of certiorari,

pp. 35-36). An unsigned warrant is a "form" with no legal significance. A "form" with typing on it has no legal significance until signed by a "neutral and detached magistrate," authorizing the intrusion requested by the state. Without that signature, no warrant exists. As the Ohio Supreme Court observed:

> A command without a known commander is not a command.

State v. Williams, 57 Ohio St. 3d at 25.

What constitutes a valid search warrant is a question of state law. In **Williams**, the Ohio Supreme Court held that in Ohio, a warrant is void without a signature.

The Ohio Supreme Court further emphasized the importance of a neutral and detached magistrate's signature as a means to insure that Ohio citizens are secure in their homes from unreasonable intrusions.

> Without having the signature of the authorizing magistrate affixed to the warrant, a citizen is left to guess whether such a warrant has validity.

Id.

Without a magistrate's signature, the citizen's assurance that a warrant is indeed an enforceable court order disappears. The Ohio Supreme Court adopted the Connecticut Supreme Court's reasoning in **State v. Surowiecki**, 184 Conn. 95, 97-98 (1981) that:

> [T]he signing of a search warrant is the only identifiable objective manifestation of a judge's subjective intent to issue a search warrant. **Id.** at 26.

State v. Williams, 57 Ohio St. 3d at 25.

As the Michigan Court of Appeals observed in **People v. Hentkowski**, 397 N.W. 2d 255, 259 (Mich. App. 1986) and cited with approval in **Williams**, 57 Ohio St. 3d at 25-26:

> The custodian should not have to guess as to whether a magistrate intended or did not intend to sign the document which is presented to the custodian.

If a signature is not required on a warrant, a citizen could not distinguish between an "actual warrant and one that is legally unenforceable," nor could a citizen "determine whether or not they are required to allow officers to conduct the search. (cite omitted). **State v. Williams**, 57 Ohio St. 3d at 26.

The Fourth Amendment prohibits "unreasonable searches and seizures." A search and seizure of a home conducted pursuant to an "unsigned warrant" is unreasonable. The State cannot be allowed to denigrate the importance of this protection by referring to the signature as a "ministerial" requirement. The magistrate's approval is manifested only by that signature. Receipt of the signature is the reason the officer presents the affidavits to the magistrate in the first place. It is not too much to ask an officer to check and see if the warrant has been signed and properly issued. The Fourth Amendment requires no less.

Since no warrant existed, neither the Wood County Court of Appeals or the Ohio Supreme Court had to consider whether the good faith exception to the exclusionary rule applied. Nor were the courts compelled to determine if the "warrant" was issued upon probable cause. These issues were simply irrelevant to any court's determination of the issues presented for review, since a search of a home without a warrant is presumptively unreasonable.

> [T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 590 (1980).

That 'firm line' at the entrance to Mr. Williams' house was "unreasonably crossed without a warrant." Although not based on Fourth Amendment grounds, the conclusion reached by the Ohio Supreme Court is no different than the conclusion compelled by the Fourth Amendment:

> A search warrant is void **ab initio** if not signed by the judge prior to the search. Evidence seized pursuant to such an invalid warrant must be suppressed.

State v. Williams, 57 Ohio St. 3d at 26.

The petition for writ of certiorari should be denied.

III. THE DECISION OF THE OHIO SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

The State of Ohio misconstrues the import of this Court's decision in **United States v. Leon**, 468 U.S. 897 (1984) and the conclusions to be drawn therefrom. The limits of the good-faith exception to the exclusionary rule were explained by this Court when Justice White wrote:

> We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated warrant cannot justify the substantial costs of exclusion. We do not suggest however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. ... Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, (cites omitted), and

> it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Id. at 922-923.

This Court described circumstances where suppression would be an appropriate remedy, two of which are present in this case:

> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (cites omitted). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient ... that the executing officers cannot reasonably presume it to be valid." (cites omitted).

Id. at 923.

An analysis of this case reveals that, even if the warrant was signed, exclusion would be warranted.

The "good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." Id. at 922, footnote 23. First, the lack of a neutral and detached magistrate's signature on the warrant does not comport with the objective standard of reasonableness this Court emphasized in **Leon**. A reasonably well trained officer would have known that the search was illegal without the magistrate's authorization on the warrant. No other "officer" could rely on the unsigned warrant. Officer Russell's subjective belief in the validity of the warrant "is not enough" to bring this case under the umbrella of the good faith exception. **Henry v. United States**, 361 U.S. 98, 102 (1959).

Second, the warrant's affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (cites omitted). **Leon**, 468 U.S. at 923. The facts in this case are more closely aligned to those set forth in **Alabama v. White** 496 U.S. ___, 110 L. Ed. 2d 301, 110 S. Ct. ___ (1990) than those facts set forth in **Leon**. In **Alabama v. White, supra**, the issue was whether an anonymous tip, corroborated by police surveillance, provided sufficient reasonable suspicion for an investigatory, **Terry**-type stop. In this case, the issue is whether an anonymous tip, **not corroborated** by **any** investigatory activity, would be sufficient to establish probable cause. No effort was made to verify the information provided by the anonymous caller, even though the information could have been verified from a bar in West Millgrove, if such a bar existed. (See supplemental appendix to state's petition for writ of certiorari, pp. 45-46). Ironically, the information provided by the anonymous caller was not even corroborated by the officer's independent familiarity with West Millgrove. The officer testified during the suppression hearing that he was "familiar with West Millgrove" and, "as far as [he knew], there is no bar there." (Tr. 24, Appendix). Nor did law enforcement make any attempt to verify the tip received from the known informant a month earlier. **Adams v. Williams**, 407 U.S. 147 (1981). The good faith exception to the exclusionary rule and the "totality of the circumstances" standard enunciated in **Illinois v. Gates** 462 U.S. 213 (1984) were not developed as constitutional substitutions for independent police work and

subsequent verification of information received. Justice White's analysis in **Alabama v. White**, 110 L. Ed. 2d at 309 is applicable to this case:

> Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors -- quantity and quality -- are considered in the "totality of the circumstances -- the whole picture" (cites omitted) that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be needed to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The **Gates** court applied its totality of the circumstances approach in this manner, taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its **indicia** of reliability as established through independent police work.

Id.

Comparing the lack of investigatory activity in this case with the investigatory accomplishments in **Leon** or even with the surveillance in **White**, one can easily see that the affidavits presented here were the type of "bare bones" affidavit this Court has never condoned. (Supplemental appendix to state's petition for writ of certiorari, pp. 43-46). The affidavits were so lacking in indicia of probable cause that no officer could rely upon them. This point was emphasized in **Leon** in footnote 24:

> Reference to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an

> officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. See **Whitely v. Warden**, 401 U.S. 560, 568 (1971).

Leon, 468 U.S. at 923.

This Court reaffirmed the purpose of the exclusionary rule in **Leon**:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.

Id. at 919.

In the instant case, at the very least, the state acted with negligence and callous disregard. This deprived Mr. Williams of the most "'clearly defined zone of privacy' protected by the Fourth Amendment -- the unambiguous physical dimensions of an individual's home." Paraphrasing **Payton v. New York**, 445 U.S. at 589.

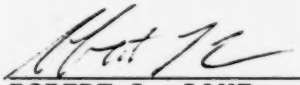
Throughout the petition, the State assumes that the affidavits established probable cause. No Ohio appellate court has made that determination, and respondent does not concede its existence. As noted earlier, the Ohio appellate courts never addressed the probable-cause issue because the warrant was so deficient under Ohio law, it was not a warrant at all. However, no constitutional principles, state or federal, would provide the state with the result it desires. No valid reason exists to grant the state's petition for writ of certiorari.

CONCLUSION

The Ohio Supreme Court's decision in **State v. Williams, supra**, reinforces state law principles but imposes no new burden on law enforcement. The decision simply requires the law enforcement officer to "check a signature line." Further, the rights that Section 14, Article I of the Ohio Constitution and the Fourth Amendment are designed to protect are significantly diminished if citizens are left at the threshold of their homes trying to distinguish between an actual warrant and one that is legally unenforceable. **Williams**, 57 Ohio St. 3d at 26. "To protect this constitutional right it is necessary to require the signature of the issuing judge on a search warrant prior to the search." **Id.** The rules, statutes, and constitution of Ohio require this protection. For the foregoing reasons, this Court should not grant the petition for writ of certiorari.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender



ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

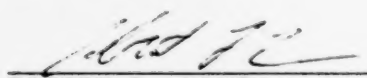
JILL E. STONE
Assistant State Public Defender

Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587
614/466-5394

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Respondent's Brief in Opposition was served on Petitioner State of Ohio by forwarding a copy to the office of its counsel, Alan R. Mayberry, Wood County Prosecuting Attorney, One Courthouse Square, Bowling Green, Ohio 43402, phone number 419/354-9250, by U.S. Mail on this 3rd day of June, 1991. I further certify that all parties required to be served have been served.



ROBERT L. LANE
Chief Appellate Counsel

COUNSEL FOR RESPONDENT

No. 90-1616

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX

**MOTION TO SUPPRESS HEARING,
EXCERPT OF THE CROSS-EXAMINATION OF
OFFICER RUSSELL**

Q: Do you know if there is -- was a bar in West Millgrove on July 15, 1988?

A: I'm not familiar with one.

Q: I'm sorry?

A: I'm not familiar with one.

Q: You're familiar with West Millgrove?

A: Yes, indeed.

Q: But there is no bar in that town as far as you know?

A: As far as I know, there is no bar there.